



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB556]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is issuing a permit for a period of 3 years to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in the WA/OR/CA sablefish pot fishery.

DATES: The permit is effective for a 3-year period beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

Reference materials for the permit including the final negligible impact determination are available on the Internet at <https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot> or <https://www.regulations.gov/docket/NOAA-NMFS-2021-0092>. Other supporting information is available on the Internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>; 2021 MMPA List of Fisheries (LOF), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock

Assessment Reports (SAR) by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

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SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: 1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; 2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and 3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. NMFS has determined that the WA/OR/CA sablefish pot fishery meets these three requirements and is issuing a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks under the MMPA for a period of 3 years.

Background

The MMPA LOF classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to

those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to three years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. The WA/OR/CA sablefish pot fishery is classified as a Category II fishery on the final 2021 LOF (86 FR 3028; January 14, 2021) based on occasional incidental M/SI of the CA/OR/WA stock of humpback whales. We evaluated ESA-listed stocks or species included on the 2021 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02-238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II WA/OR/CA sablefish pot fishery, as classified on the final 2021 MMPA

LOF, to incidentally kill or seriously injure the CA/OR/WA stock of humpback whale (86 FR 58641; October 22, 2021).

NMFS will regularly evaluate other commercial fisheries for purposes of making a negligible impact determination (NID) and issuing MMPA section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the WA/OR/CA sablefish pot fishery is available in the 2021 MMPA LOF (86 FR 3028; January 14, 2021) and on the Internet at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

We reviewed the best available scientific information to determine if the WA/OR/CA sablefish pot fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit for the incidental taking of ESA-listed marine mammals. This information is included in the 2021 MMPA LOF (86 FR 3028; January 14, 2021), the SAR for CA/OR/WA stock of humpback whale (available at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>), the humpback whale recovery plan (available at:

<https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the document describing the preliminary and final determinations supporting the permit (available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0092>).

NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA

stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are revised in light of the ESA DPSs, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.*, selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the ESA and overlaps with the analyzed commercial fishery. Therefore, for the purpose of this MMPA 101(a)(5)(E) authorization, NMFS considered the CA/OR/WA stock of humpback whale to be ESA-listed as it overlaps with two ESA-listed DPSs (Mexico and Central America).

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine that the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Criteria for Determining Negligible Impact

NMFS relies on a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),” which became effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at:

<https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy->

directives. This directive describes NMFS' process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing a MMPA section 101(a)(5)(E) permit as noted above).

The directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_t), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t. If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s. If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a

negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue a MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These NID criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determination

NMFS evaluated the impact of the WA/OR/CA sablefish pot fishery using the process outlined in the directive, and, based on the best available scientific information, made a NID.

The CA/OR/WA stock of humpback whale is a transboundary stock. As noted above, because of the uncertainty regarding M/SI that occurs outside of U.S. waters for transboundary stocks, we assumed that total M/SI exceeds NIT_t and proceeded directly to the Tier 2 NIT_s analysis. The proposed NID relied on the final 2019 CA/OR/WA humpback whale SAR. Since the publication of the proposed MMPA 101(a)(5)(E) permit for the WA/OR/CA sablefish pot fishery, the draft 2021 SAR for the CA/OR/WA stock of humpback whales was published (86 FR 58887; October 25, 2021). The M/SI estimates in the draft 2021 CA/OR/WA humpback whale SAR for the WA/OR/CA sablefish pot fishery remain the same as the M/SI estimates in the final 2019 SAR and the draft 2021 SAR was used for the final NID analysis (see response to comment #7 below).

The CA/OR/WA stock of humpback whale has documented incidental M/SI with this fishery in the most recent (2021) draft CA/OR/WA humpback whale SAR (Carretta *et al.* 2021). The estimated annual M/SI of humpback whales (CA/OR/WA stock) in the WA/OR/CA sablefish pot fishery is 1.9, based on observer data. Since this M/SI (1.9) is less than NIT_s (2.48), NMFS determined that the WA/OR/CA sablefish pot fishery has a negligible impact on the CA/OR/WA stock of humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The draft 2021 SAR includes mean annual total commercial fishery-related M/SI (≥ 25.2) for the CA/OR/WA stock of humpback whale. This comprises M/SI from all commercial fisheries, including the WA/OR/CA sablefish pot fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial, recreational or tribal fisheries, including the WA/OR/CA sablefish pot fishery. Because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include unattributed mortality in the calculations for the NID Tier 2 analysis. In addition, because the CA/OR/WA humpback whale stock is considered to be a transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion. NMFS is actively monitoring the WA/OR/CA sablefish pot fishery through a fishery observer program. Further, most of the information on large whale entanglements on the West Coast is reported to and documented by the West Coast Large Whale Entanglement Response Program. If additional fishery-related M/SI of the CA/OR/WA stock of humpback whale is documented through the observer program or West Coast Large Whale Entanglement Response Program that indicates additional M/SI of the CA/OR/WA stock of humpback whale in the WA/OR/CA sablefish pot fishery, then NMFS will re-evaluate the NID and the permit.

The NID analysis is presented in the accompanying MMPA 101(a)(5)(E) determination document that provides summaries of the information used to evaluate each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery. The final MMPA 101(a)(5)(E) determination document is available at: <https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot> or <https://www.regulations.gov/docket/NOAA-NMFS-2021-0092>. Based on the criteria outlined in the directive, the most recent SAR, and the best available scientific information, NMFS has determined that the M/SI incidental to the Category II WA/OR/CA sablefish pot fishery will have a negligible impact on the associated ESA-listed marine mammal stock (CA/OR/WA stock of humpback whale). Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for the commercial fishery.

Recovery Plan

The humpback whale recovery plan has been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>). Accordingly, the requirement to have a recovery plan in place or being developed is satisfied.

Take Reduction Plan

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stock considered for this permit is designated as a strategic stock under the MMPA because the stock, or a component of the stock, is listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR,

respectively. The obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs when funding is insufficient. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS uses the most recent SAR and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

Based on NMFS' priorities, implementation of a TRP for the WA/OR/CA sablefish pot fishery is currently deferred under MMPA section 118 as other stocks/fisheries are a higher priority for any available funding. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determination supporting the permit available on the Internet at <https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot> or <https://www.regulations.gov/docket/NOAA-NMFS-2021-0092>).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. The WA/OR/CA sablefish pot fishery is the subject of a NMFS fishery observer program. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

Conclusions for Permit

Based on the above evaluation for the WA/OR/CA sablefish pot fishery as it relates to the three requirements of MMPA 101(a)(5)(E), we are issuing a MMPA 101(a)(5)(E) permit to the WA/OR/CA sablefish pot fishery to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support the determinations, NMFS will re-evaluate whether to amend or modify the authorization, after notice and opportunity for public comment.

ESA Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of the WA/OR/CA sablefish pot fishery on ESA-listed marine mammals were analyzed in an October 2020 ESA section 7 Biological Opinion.

Under section 7 of the ESA, Biological Opinions analyze the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, exempt anticipated future take of ESA-listed species as specified in the incidental take statement. Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the negligible impact determination process, and when the necessary findings can be made, issues a MMPA section

101(a)(5)(E) permit that allows for an unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations. Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, may not always align.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because this permit would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plans is required for the permit. Issuing the permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Comments and Responses

On October 22, 2021, NMFS published a notice and request for comments in the **Federal Register** for the proposed issuance of permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II WA/OR/CA sablefish pot fishery (86 FR 58641). The public comment period closed on November 8, 2021. NMFS received seven comment letters on the proposed issuance of the permit and underlying preliminary negligible impact determination. The Center for Biological Diversity (CBD) and a joint letter from Whale and Dolphin Conservation and Natural Resources Defense Council (WDC/NRDC) oppose issuing the permit while Langford Walton & Associates, Sablefish and Halibut Pot Association, and a member of the public support issuing the permit. In addition, the Fishing Vessels Owner's Association supports issuing the permit and commented on several ways the ESA section 7 Biological Opinion supported the determinations in the proposed MMPA 101(a)(5)(E) permit. NMFS also received a joint letter from Whale and Dolphin Conservation, Defenders of Wildlife and Natural Resources Defense Council (WDC et al.) requesting NMFS extend the public comment

period for the proposed permit. Only responses to substantive comments pertaining to the proposed permit and preliminary determination under MMPA section 101(a)(5)(E) are addressed below.

Comment 1: WDC et al. requested NMFS extend the comment period by 15-days for the proposed issuance of a MMPA 101(a)(5)(E) permit to authorize the incidental take of the CA/OR/WA stock of humpback whales in the WA/OR/CA sablefish pot fishery.

Response: NMFS did not grant an extension to the comment period, as the information presented in the proposed determination was not new but rather is based on the M/SI data from the most recent final humpback whale stock assessment report, published in 2020. On June 17, 2020, NMFS finalized Procedure 02-204-02 (Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)). The procedural directive describes NMFS' process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks. The criteria and process from that procedural directive, including the calculation for developing a negligible impact threshold, was used in order to determine that the WA/OR/CA sablefish pot fishery has a negligible impact on the CA/OR/WA stock of humpback whales. The NID determination and proposed MMPA 101(a)(5)(E) permit was based on the best available science on the stock's minimum population estimate, recovery factor, and the most recent estimates of M/SI in the WA/OR/CA sablefish pot fishery.

Comment 2: CBD incorporates their previous comments submitted on both the NMFS' draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" and the proposed MMPA 101(a)(5)(E) authorizations published on October 5, 2020 (85 FR 62709).

Response: CBD’s comments on the draft “Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)” were previously addressed by NMFS and are available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>. Comments on the proposed MMPA 101(a)(5)(E) authorizations published on October 5, 2020 (85 FR 62709) were addressed in the **Federal Register** notice for the final MMPA 101(a)(5)(E) authorizations (86 FR 24384; May 6, 2021).

Comment 3: CBD asserts that because NMFS has not revised the CA/OR/WA humpback whale stock structure following the designation of 14 DPS under the ESA the assumptions of the negligible impact thresholds do not hold true. CBD raises two issues with applying NIT_t and NIT_s to the CA/OR/WA stock of humpback whale: (1) the CA/OR/WA stock is not ESA-listed, and (2) the stock does not conform to the assumptions of PBR. CBD states that NMFS cannot assume that M/SI levels are below NIT_t and NIT_s for the WA/OR/CA stock will not prevent recovery of the ESA-listed DPSs, especially the Central America DPS. They further note that the CA/OR/WA stock of humpback whale abundance estimate is based on mark-recapture models for closed populations, ignoring the designation of the ESA DPSs. CBD points to NMFS’ “Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E) guidance” and recommends a NID analysis be conducted for an ESA-listed stock that does not conform to the underlying assumptions of PBR and consider if there is an alternate approach to determining negligible impact. They request NMFS use an alternate approach, revise the draft NID, and make it available for public comment.

Response: Humpback whales were listed globally as endangered under the ESA in 1970 (35 FR 18319). On September 8, 2016, NMFS published a final rule dividing the globally listed endangered humpback whale into 14 DPSs and categorizing four DPSs as endangered and one as threatened (81 FR 62259). NMFS is in the process of revising

humpback whale stock structure under the MMPA in light of the 2016 final rule on humpback whale DPSs as established under the ESA. In doing so, NMFS is following the process laid out in “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). As noted by the commenters, the CA/OR/WA stock of humpback whales does not align with the DPSs established under the ESA and comprises animals from the endangered Central American DPS, the threatened Mexico DPS, and the unlisted Hawaii DPS.

Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until humpback whale stock structure has been revised, NMFS continues to use the existing MMPA stock structure for MMPA management purposes, including NIDs and 101(a)(5)(E) authorizations. Therefore, for purposes of evaluating the impact of the WA/OR/CA sablefish pot fishery under the MMPA, NMFS used the current MMPA designation of the CA/OR/WA stock of humpback whales. In the case of the CA/OR/WA stock of humpback whales, for the purposes of this NID analysis, NMFS considers the entire stock to be endangered under the ESA and depleted under the MMPA. In addition, because the CA/OR/WA humpback whale stock is considered to be transboundary, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion.

Given this approach and ongoing efforts to revise humpback whale stock structure in the Pacific, NMFS has proceeded with a final NID for the WA/OR/CA sablefish pot gear fishery with respect to the CA/OR/WA stock of humpback whales and is issuing a 101(a)(5)(E) permit for this fishery. Nevertheless, if, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, including a change in MMPA stock structure and associated estimates of abundance and M/SI incidental to commercial fisheries, NMFS will re-evaluate the NID.

Comment 4: Both CBD and WDC/NRDC note that the humpback whale recovery plan included in the proposed permit is for the world-wide population that was finalized in 1991. They state that NMFS identified 14 DPSs of humpback whales in 2016, and updated recovery plans have not been developed for the 14 DPSs. Therefore, the 1991 humpback whale recovery plan does not meet the requirement of MMPA section 101(a)(5)(E).

Response: Given that the 1991 NMFS Recovery Plan for humpback whales was written for the taxonomic species, it is still applicable to humpback whale DPSs within the species and still serves as a guide for recovery actions for the currently listed DPSs that occur in U.S. waters. As noted in the final rule designating humpback whale critical habitat (86 FR 21082, April 21, 2021), some of the objectives of the 1991 Recovery Plan are still relevant today for the Mexico and Central America, and Western North Pacific DPSs. Furthermore, NMFS is working to develop updated humpback DPS recovery plans as resources allow. However, the 1991 Recovery Plan satisfies the recovery plan need for the purposes of MMPA 101(a)(5)(E), while new recovery plans are developed.

Comment 5: CBD states that NMFS has not established a program to monitor incidental marine mammal M/SI in the WA/OR/CA sablefish pot fishery. They note that the observer program that observes a portion of this fishery was not established to monitor marine mammal M/SI but to monitor groundfish catch composition. Therefore, the monitoring program does not meet the requirements of MMPA section 118(d).

Response: The observer program in the sablefish pot fishery collects data on all target and non-target species, including the incidental M/SI of marine mammals. Data from the observer program is used by NMFS scientists to generate statistically valid estimates of entanglements and mortality/serious injury that are represented in the most recent SAR for the CA/OR/WA stock of humpback whales. As such, it satisfies the requirement in MMPA section 101(a)(5)(E)(i)(III). Given that estimates of entanglements

produced from observer data are used in the NID analysis, it is incorrect to state the NID analysis relies only upon confirmed entanglement reports.

Comment 6: CBD states that NMFS is not developing and has not developed a TRP for humpback whales in the WA/OR/CA sablefish pot fishery, noting NMFS' response that developing a TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries has been deferred under MMPA section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs. They acknowledge that NMFS updated the list of priorities for establishing TRTs in September 2021, and the CA/WA/OR stock of humpback whale remains a low priority for establishing a TRT. CBD disagrees with NMFS that the NMFS priorities for establishing TRTS meets the MMPA section 101(a)(5)(E) requirement and asserts that MMPA section 101(a)(5)(E) requires a TRP be in place or in development prior to authorizing incidental take of these ESA-listed marine mammals.

Response: As we have noted previously (86 FR 58641; October 22, 2021), MMPA section 118(f)(3) contains specific priorities for developing TRPs if insufficient funding is available to further develop and implement TRPs for all applicable stocks and fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. Thus, NMFS prioritizes which stocks and fisheries to address under a TRP. MMPA section 118(f) provides that if there is insufficient funding available to develop and implement a take reduction plan for stocks that interact with Category I and II fisheries, the Secretary shall give highest priority to the development of TRPs for species or stocks whose level of incidental mortality and serious injury exceeds PBR, that have a small population size, and those that are declining most rapidly. As noted in the **Federal Register** notice announcing NMFS's proposed intent to issue a 101(a)(5)(e) permit for the WA/OR/CA sablefish pot fishery, the CA/OR/WA stock of humpback whale

authorized to be incidentally taken under this permit is currently a lower priority for developing a TRP because of the low levels of M/SI incidental to commercial fishing compared to other marine mammal stocks and commercial fisheries.

Comment 7: WDC/NRDC comments that the proposed permit is based on the 2019 CA/OR/WA humpback whale SAR and the 2019 SAR does not include up-to-date data on confirmed entanglements in the WA/OR/CA sablefish pot fishery reported in Carretta *et al.* 2021a. They also state that NMFS did not include confirmed unattributed humpback whale entanglements in the NID analysis and, by doing so, NMFS has underestimated humpback whale M/SI in the WA/OR/CA sablefish pot fishery.

Response: Since the publication of the proposed MMPA 101(a)(5)(E) permit for the WA/OR/CA sablefish pot fishery, the draft 2021 SAR for the CA/OR/WA stock of humpback whales published and is available for public comment (86 FR 58887; October 25, 2021). The M/SI estimates in the draft 2021 CA/OR/WA humpback whale SAR for the WA/OR/CA sablefish pot fishery remain the same as the M/SI estimates in the final 2019 SAR. The 2014 humpback whale mortality and the 2016 humpback whale serious injuries in the WA/OR/CA sablefish pot fishery reported in Carretta *et al.* 2021a are included in the M/SI estimates in the 2019 CA/OR/WA humpback whale SAR that was used in the analysis for the proposed permit. Carretta *et al.* 2021a also includes a non-serious injury of a humpback whale in the WA/OR/CA sablefish pot fishery that occurred in 2017. As noted in Carretta *et al.* 2021a, this non-serious injury is not counted against PBR and is not included in the M/SI estimates for the fishery. The accompanying MMPA 101(a)(5)(E) determination document has been updated to reflect the draft 2021 CA/OR/WA humpback whale SAR.

As noted above, the CA/OR/WA humpback whale SAR also includes unattributed fishery-related M/SI for the stock, which is not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial,

recreational or tribal fisheries, including the WA/OR/CA sablefish pot fishery. Because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include it in the calculations for the NID Tier 2 analysis. In addition, because the CA/OR/WA humpback whale stock is considered to be transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion.

Comment 8: WDC/NRDC notes that the proposed permit uses a different abundance estimate for the CA/OR/WA stock of humpback whale than the abundance estimate in the final 2019 SAR. They state that NMFS has identified the Central America DPS as a demographically independent population (DIP) under the MMPA, and PBR should be calculated for the Central America DIP separately.

Response: See response to Comment #3 and #7 above. The abundance estimates for the CA/OR/WA stock of humpback whales used in the analysis for the proposed permit are consistent with the final 2019 SAR and the recent 2021 draft SAR. As noted in the response to comment #3, NMFS is in the process of revising humpback whale stock structure following the process laid out in NMFS (2019). This process includes evaluating the lines of evidence to support the delineation of DIPs, including whether such evidence supports the delineation of the Central America DPS as a DIP. Martien et al. (2019) does not serve as the DIP delineation document for the Central America DPS. In the analysis supporting issuance of this permit and the NID, NMFS relied on the existing MMPA designation of the CA/OR/WA stock of humpback whales. Nevertheless, if, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, including a change in MMPA stock structure, NMFS will re-evaluate the permit.

Comment 9: WDC/NRDC reiterate their previous comments submitted on the NMFS' draft "Criteria for Determining Negligible Impact under MMPA Section

101(a)(5)(E)." They restate that the approach to negligible impact determinations undermines the protections for marine mammals protected as threatened or endangered under the ESA, and assessing the impacts of a single fishery when total M/SI exceeds PBR is an inadequate standard. WDC/NRDC requests NMFS consider total human-caused M/SI for the humpback whale DPSs, and if all fisheries-related M/SI exceeds PBR for the Central America or Mexico DPS, that NMFS delay issuing the permit until mitigation measures are implemented.

Response: As previously stated (86 FR 24384; May 6, 2021), NMFS received several comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" stating the directive was either overly precautionary or not precautionary enough. These comments were previously addressed in the response to comments (see Comment #4) on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)." The full response to comments on the procedural directive is available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

As described in the "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)," due to the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t for transboundary, migratory stocks and proceed directly to the Tier 2 NIT_s analysis. The CA/OR/WA stock of humpback whale is considered a transboundary stock and using the "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" a Tier 2 NIT_s analysis was conducted.

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Dated: December 2, 2021.

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